In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 579

MILTON M. FERRELL, PETITIONER

v.

HONORABLE CHARLES B. FULTON, As One of the Judges of the United States District Court for the Southern District of Florida

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 5, 1966, a jury including two alternate jurors was sworn (R. 7)[1] to try petitioner on two counts of violating 26 U.S.C. 7206(1) by subscribing false tax returns for 1959 and 1960 (R. 1-6). On April 6, 1966, the trial court informed counsel that a juror, whose identity the court then declined to re-

[1] "R." refers to petitioner's appendix in the court of appeals.

veal, had reported to the court that, after the jury was impanelled (R. 11), he was arrested for shoplifting and was to have a preliminary hearing (R. 13). The court informed counsel that the juror was "upset" and that they should reflect on what should be done (R. 8). The court advised counsel that he was "contemplating excusing" the juror "unless this thing clears up very quickly," because "his capacity as a juror has been seriously questioned [by], let us say, circumstances beyond his control, nevertheless existing" (R. 10). On April 8, 1966, prior to summations, the court offered counsel the opportunity to make inquiries of the juror (R. 11-12). Petitioner's counsel took the position that no cause appeared to excuse this juror even "Assuming it is precisely as the Court has heretofore stated * * *" (R. 13). After the charge, the juror answered "Yes" when the trial judge asked in open court, "is your trouble still bothering you a little bit?" The judge then excused him because he "had a matter that was worrying him and harassing him * * *" (R. 15-16). An alternate juror was substituted. The jury was unable to agree on a verdict, and was discharged (R. 16-17).

A subsequent motion by petitioner to dismiss the indictment on the ground he had been placed in jeopardy and could not be retried was denied (R. 27). The court of appeals denied his application for a writ of prohibition or mandamus to bar a retrial (Pet. App. 1).

The double jeopardy clause does not bar a retrial of petitioner. There is no conflict or other cause for review in this Court.

The trial court acted with propriety and good judgment in discharging the juror. This juror was sufficiently disturbed by being arrested on a shoplifting charge to approach the court. The court did not act hastily, but deferred action in hopes that the juror's difficulty would clear up, as, perhaps, by the local prosecuting authorities accepting the juror's explanation to the trial court that he had left a store with merchandise momentarily to get some money out of his automobile (R. 7). However, the filing of a formal charge [2] and the juror's acknowledgement that he was upset justified the trial court in its view that the incident had seriously affected the juror's capacity to serve.

The trial court's action was not, as petitioner argues (Pet. 14), inconsistent with the statutory qualifications for jurors set in 28 U.S.C. 1861. The trial court's remark that this juror was "hardly qualified to sit on a criminal jury" in the circumstances (R. 11) was directed at the juror's capacity to function, as seen in the court's statement that "his capacity as a juror has been seriously questioned" (R. 10). This is certainly in accord with 28 U.S.C. 1861(3), which disqualifies from jury duty a person who "is incapable by reason of mental * * * infirmities to render efficient jury service."

This is not a case such as *Downum* v. *United States*, 372 U.S. 734, where the trial judge granted a

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[2] Petitioner's motion to dismiss the indictment alleged that the juror was subsequently formally charged with violation of a municipal ordinance (R. 20).

mistrial after the jury was sworn because the prosecutor had neglected to procure the attendance of all his witnesses. This Court recognized in *Downum* (p. 736) that a trial court has some "discretion to discharge the jury before it has reached a verdict," albeit a discretion that may be exercised "'only in very extraordinary and striking circumstances'." One frequently given example was described in *Wade* v. *Hunter*, 336 U.S. 684, 689:

> And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial. * * *

See *United States* v. *Cimino*, 224 F. 2d 274 (C.A. 2). If a mistrial may be declared, the less drastic action of substituting an alternate juror should be equally permissible. Doubt of a juror's mental capacity to continue should be as allowable a ground for substitution as the appearance of prejudice.

The paucity of decided cases canvassing the practice of substituting alternate jurors during trial is doubtless due to a general recognition that such a use of the alternate juror procedure is not an encroachment on the right to jury trial. We are aware of only one analogous case in the federal courts of appeals. That is *Houlihan* v. *United States*, 332 F. 2d 8, 12, certiorari denied, 379 U.S. 828, where the Second Circuit sustained against an attack founded on the Due Process Clause the action of a trial

court that excused, without consultation with counsel, a nurse whose patient suffered a heart attack during the trial. See, also, *People* v. *Hess*, 104 Cal. App. 2d 642, 678-687, 234 P. 2d 65, 89, appeal dismissed, 342 U.S. 880 (juror's father suffered stroke).

This is not to say, as petitioner asserts (Pet. 15), that approval of what the trial judge did here would mean that no line can "be drawn as to when the trial court can remove a juror." Certainly the power to substitute an alternate during trial is no different from the power to excuse a member of the venire for cause. Cf. *People* v. *Hamilton*, 60 Cal. 2d 105, 126, 383 P. 2d 412, 424.

But, apart from such limitations, a defendant enjoys the full substance of his constitutional right to jury trial if he is judged, as was petitioner, by twelve of the combined primary and alternate jurors. This was the holding in *People* v. *Peete*, 54 Cal. App. 333, 202 Pac. 51, and it was the *Peete* case that was primarily relied on for precedent in the legislative reports preceding the Act of June 29, 1932, c. 309, 47 Stat. 380, that first provided for alternate jurors in federal jury trials. S. Rep. 866 and H. Rep. 957, 72d Cong., 1st Sess. This statute was held constitutional in *Robinson* v. *United States*, 144 F. 2d 392 (C.A. 6), affirmed on other grounds, 324 U.S. 282. See also, *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 117 (C.A. 6), affirmed, 328 U.S. 781. Other state cases in accord with the *Peete* case are *People* v. *Mitchell*, 266 N.Y. 15, 18, 193 N.E. 445-446 *State* v. *Dalton*, 206 N.C. 507, 512-513, 174

S.E. 422, 424-425; *Commonwealth* v. *Fugmann*, 330 Pa. 4, 29, 198 Atl. 99, 111-112; *State* v. *Dolbow*, 117 N.J.L. 560, 567, 189 Atl. 915, 918-919, appeal dismissed, 301 U.S. 669, (upholding procedure of drawing ultimate jurors from the sworn panel *after* the case is tried); *Commonwealth* v. *Bellino*, 320 Mass. 635, 71 N.E. 2d 411, 415, certiorari denied, 330 U.S. 832 (same).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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